No. 04-1028

Supreme Court, U.S.
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In The Supreme Court of the United States

PEOPLE OF THE STATE OF CALIFORNIA
ex rel. BILL LOCKYER, ATTORNEY GENERAL,

Petitioner,

v.

DYNEGY, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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CORPORATE DISCLOSURE STATEMENTS

[Case No. 04-1028]

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

Respondent Dynegy Inc. is a publicly traded company in which Chevron USA Inc. owns a minority interest in excess of 10 percent; Chevron USA Inc. is a wholly-owned subsidiary of ChevronTexaco Corporation, a publicly traded company; Dynegy Power Marketing Inc. is, through intermediate holding companies, a wholly owned subsidiary of Dynegy, Inc.; West Coast Power LLC is owned (through intermediate holding companies) 50 percent by Dynegy, Inc. and 50 percent by NRG Energy Inc.; Cabrillo Power I, LLC, Cabrillo Power II, LLC, El Segundo Power LLC, and Long Beach Generation LLC, are all owned by West Coast Power LLC.

Respondent Reliant Energy, Inc. is a publicly traded corporation; no publicly held corporation owns 10 percent or more of the stock of Reliant Energy, Inc.; Reliant Energy Services, Inc. is a wholly-owned subsidiary of Reliant Energy, Inc.; Reliant Energy Power Generation, Inc. is also a wholly-owned subsidiary of Reliant Energy, Inc; Reliant Energy Coolwater, Inc., Reliant Energy Ellwood, Inc., Reliant Energy Etiwanda, Inc., Reliant Energy Mandalay, Inc., and Reliant Energy Ormond Beach, Inc. are wholly-owned subsidiaries of Reliant Energy California Holdings, LLC, which is a wholly-owned subsidiary of Reliant Energy Power Generation, Inc.

CORPORATE DISCLOSURE STATEMENTS – Continued

Respondent Mirant Corporation* is a publicly held company in bankruptcy. No publicly held corporation owns more than 10 percent of the stock of Mirant Corporation. Mirant Corporation is the corporate parent of Mirant Americas, Inc.; Mirant California Investments, Inc. and Mirant Americas Energy Marketing Investments, Inc. are subsidiaries of Mirant Americas Generation, LLC, which is a subsidiary of Mirant Americas, Inc.; Mirant Delta, LLC and Mirant Potrero, LLC are subsidiaries of Mirant California, LLC, which is a subsidiary of Mirant California Investments, Inc.; Mirant Americas Energy Marketing, LP is a subsidiary of Mirant Americas Energy Marketing Investments, Inc.; Southern Energy Golden States Holdings, Inc. is the predecessor corporation of Mirant California Investments, Inc.

Respondent Xcel Energy, Inc. is a publicly held corporation. No publicly held corporation owns 10 percent or more of the stock of Xcel Energy, Inc.; NRG Energy, Inc. is a wholly owned subsidiary of Xcel, Inc.

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* Respondent Mirant Corporation, currently in bankruptcy, is not joining in or filing an opposition.

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INTRODUCTION

The questions stated in the Petition are not worthy of review. They raise none of the issues traditionally guiding this Court's grant of review. *See* S. CT. R. 10. The Court of Appeals faithfully and correctly applied precedent regarding federal removal jurisdiction, consistent with both this Court's and other federal appeals courts' prior decisions. Decisions of this Court and courts of appeals also unanimously confirm that the Eleventh Amendment does not bar removal of a case in which a state is the plaintiff and in which no claim is asserted against it. Review of these pure jurisdictional issues is not warranted where, as here, Petitioner's claims cannot survive on their merits in any court, state or federal. Petitioner's failure to challenge the dismissal on the merits concedes the futility of this Petition.

STATEMENT OF THE CASE

A. The Regulatory Background

As this Court observed in *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39, 41 (2003) ("*Entergy*"): "The Federal Energy Regulatory Commission (FERC) regulates the sale of electricity at wholesale in interstate commerce. 16 U.S.C. § 824(b)." Historically, FERC exercised this regulatory jurisdiction by requiring the filing of tariffs containing cost-based rate schedules. But as the Court of Appeals explained:

> [In 1996] . . . the California Legislature decided that reshaping the market for California energy could help provide competitive, lower cost and reliable electric service, while preserving the state's commitment to developing diverse, environmentally sensitive electricity resources. . . . That legislation formed two non-governmental entities to orchestrate the transmission and sale of electricity:

> the Independent System Operator ("ISO") and the Independent Power Exchange ("PX"). . . .

Pet. App. at 5a. Both the ISO and PX were subject to the jurisdiction of the FERC. *Id.* at 6a.

FERC authorized this restructuring in a series of orders approving tariffs filed by the PX and ISO. The tariffs set out in literally voluminous detail the rules for operating in the California wholesale electricity markets. FERC also and separately approved market participants' individual tariffs providing for sales at market-based prices. Under the ISO tariff, "ancillary services" agreements were contracts with the ISO to keep power in reserve, available for delivery in response to uncertain electric supply shortages. *Id.* The Respondent generators and marketers participated in the ISO ancillary services market pursuant to the ISO's "tariff on file with and approved by FERC. . . ." *Id.* at 7a. For the Ancillary Services at issue here, bids would be submitted to the ISO according to its tariff. The ISO tariff also detailed other terms for the sale of Ancillary Services. Thus, "the conduct the state [seeks] to condemn was expressly governed by the ISO tariffs." *Id.* at 14a. The tariff "obligates the generators to maintain specified reserve capacity in the ancillary service market and . . . details penalties and remedies for non-compliance." *Id.* at 13a-14a. In short, "the tariffs here directly implicate the federal regulatory regime, were filed with FERC, and concern obligations directly and exclusively arising under regulations issued pursuant to the FPA [Federal Power Act]." *Id.* at 22a.

FERC has been actively exercising its jurisdiction over the precise conduct alleged in Petitioner's complaint. In *American Electric Power Service Corp.*, FERC issued an "Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior" which examined the transactions of 43

sellers of energy and ancillary services, including certain Respondents in this action. 103 F.E.R.C. ¶ 61,345 (2003). In this broad proceeding, FERC investigated whether certain transactions were in violation of the ISO and PX tariffs during the period of January 1, 2000 to June 20, 2001, and whether they warranted a monetary remedy of disgorgement of unjust profits or other non-monetary remedies. Among the various types of behavior FERC investigated were allegations of "Double Selling," which involved selling ancillary services in the day-ahead market, but later selling those same resources as energy in the hour-ahead or real-time markets. *Id.* at P. 50. The same alleged conduct is at the center of Petitioner's complaint. Pet. App. at 133a, 148a, 152a-153a.

FERC settled the Double Selling claims against certain Respondents with significant participation by Petitioner. For example, on March 4, 2004, FERC approved a settlement with the Respondent Reliant parties. *Reliant Resources, Inc.*, 106 F.E.R.C. ¶ 61,207 (2004). Reliant did not admit to any tariff violation but paid $836,000, which was the total *revenues* (not profits) potentially received by Reliant from the alleged Double Selling of ancillary services. *Reliant Resources, Inc.*, Docket No. EL03-170-000, "Certification of Contested Settlement," December 9, 2003 at P. 26. Significantly, this sum was derived from an analysis filed with FERC by the "California Parties," who include Petitioner, which purported to quantify the ancillary services they alleged Reliant had "double-sold." *Id.* at P. 53. The settlement accepted *arguendo* the California Parties' allegations, and Reliant's payment included all revenues it received assuming the validity of their analysis. *Id.*

On August 5, 2004, FERC similarly approved a settlement with the Respondent Dynegy parties, in which Dynegy did not admit to any tariff violation but paid $3,017,416 to resolve the matter. *Dynegy Power Mktg., Inc.*, 108 F.E.R.C. ¶ 61,145 (2004). This sum also was derived by assuming the validity of an analysis filed by the California Parties – including Petitioner – which purported to quantify the ancillary services Dynegy allegedly "double-sold," and the sum comprised all revenues Dynegy received, accepting this analysis. *Dynegy Power Mktg., Inc.*, 107 F.E.R.C. ¶ 63,039 at P. 58 (2004).

On January 31, 2005, Respondent Mirant, along with Petitioner and the other California Parties, submitted a "Joint Offer of Settlement" to FERC, which would resolve those parties' disputes in numerous proceedings pending before FERC, including those concerning the ancillary services allegations that are the subject of Petitioner's complaint. *San Diego Gas & Elec. Co.*, "Joint Offer of Settlement," Docket No. EL00-95 et al., January 31, 2005. The settlement includes a payment that does not separate out a specific amount for Ancillary Services. *Id.* at 4. Final FERC approval of this settlement is pending.

FERC has also issued detailed rules to govern market behavior in wholesale electricity markets, incorporating those rules in all existing market-based rate tariffs. *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, Order Amending Market-Based Rate Tariffs and Authorizations, 105 F.E.R.C. ¶ 61,218 (2003).[1]

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[1] FERC has also been actively exercising its jurisdiction over other aspects of the California wholesale electricity market. The Commission is addressing these issues in several proceedings, including the multifaceted docket captioned *San Diego Gas & Electric Co. v. Sellers of*

(Continued on following page)

B. Proceedings Below

Petitioner filed civil complaints in state court against Respondents, companies generating electric power for sale at wholesale in California. The complaints at issue allege that Respondents violated California's Unfair Competition Law (California Business & Professions Code § 17200 *et seq.*) through unlawful, unfair, or fraudulent activity aimed at manipulating the wholesale electricity market, a market regulated exclusively by FERC. Petitioner complained that Respondents participated in "a scheme to violate the rules of the ISO [Independent System Operator] market." Pet. App. at 133a. Respondents removed the case to the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 1441, 16 U.S.C. § 825p (Federal Power Act), and 28 U.S.C. § 1331, and Petitioner moved to remand.

The district court denied remand in a thorough unpublished order, (Pet. App. at 44a, 59a), finding jurisdiction under Section 825p and applying this Court's decision in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), on the

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Energy and Ancillary Services, etc. ("*SDG&E v. Sellers*"). In a series of decisions in that proceeding, which FERC aptly calls the "California Refund Proceeding," FERC has acted to remedy potential flaws in the California market structure, and has provided for the calculation of refunds for charges determined to exceed the just and reasonable level. *See SDG&E v. Sellers*, Order Directing Remedies for California Wholesale Electric Markets, 93 F.E.R.C. ¶ 61,294 (Dec. 15, 2000); *id.*, Order Directing Sellers to Provide Refunds of Excess Amounts Charged for Certain Electric Energy Sales, etc., 94 F.E.R.C. ¶ 61,245 (Mar. 9, 2001); *id.*, Order Establishing Evidentiary Hearing Procedures, Granting Rehearing in Part, and Denying Rehearing in Part, 96 F.E.R.C. ¶ 61,120 (July 25, 2001); *id.*, Order on Proposed Findings on Refund Liability, 102 F.E.R.C. ¶ 61,317 (Mar. 26, 2003); *id.*, Order on Rehearing, 105 F.E.R.C. ¶ 61,066 (Oct. 16, 2003); *id.*, Order on Requests for Rehearing and Clarification, 107 F.E.R.C. ¶ 61,165 (May 12, 2004).

Eleventh Amendment issues. *See* Pet. App. at 52a, 55a-56a, 58a-59a. In a subsequent decision, the district judge dismissed Petitioner's case on preemption and filed-rate grounds. Pet. App. at 61a, 83a, 86a, 92a. He ruled that the FPA preempts state law regulation of wholesale electricity markets, whether through litigation or other means. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964). *See* Pet. App. at 81a-84a, 86a. In addition to field and conflict preemption, the district court relied, as an alternative basis for its dismissal ruling, on the filed rate doctrine as discussed in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), and most recently reaffirmed in *Entergy*, 539 U.S. at 47. Pet. App. at 88a-89a.

The Court of Appeals unanimously upheld the denial of remand. It concluded that Petitioner, though purportedly relying on state law for his cause of action, pleaded a claim that "was a naked attempt to enforce these [FERC-governed] federal obligations." Pet. App. at 22a. Further, the court held that the sovereign immunity *defense* does not bar removal when the state itself is pursuing the claim. *Id.* at 32a-33a.

The Court of Appeals also affirmed dismissal on field preemption and filed rate grounds.[2] Pet. App. at 41a n.23, 42a. Other panels of the Ninth Circuit have since applied similar reasoning to uphold dismissals of state law claims. *Pub. Util. Dist. No. 1 of Grays Harbor County v. Idacorp Inc.*, 379 F.3d 641 (9th Cir. 2004) (field preemption, conflict

[2] The court of appeals did not address the conflict preemption argument. Pet. App. at 41a n.23

preemption, and filed rate); *Pub. Util. Dist. No. 1 of Snohomish County v. Dynegy Power Marketing, Inc.*, 384 F.3d 756 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3343 (U.S. Nov. 5, 2004) (No. 04-621) (field preemption, conflict preemption and filed rate). In two unpublished memorandum opinions addressing related California electricity cases, including another action brought by Petitioner under the same state statute as the instant case, the Ninth Circuit affirmed removal and dismissals of the actions. *California ex rel. Lockyer v. TransCanada Power L.P.*, 2004 U.S. App. LEXIS 21727 (9th Cir. Oct. 12, 2004) (removal jurisdiction, field preemption, conflict preemption, and filed rate); *T&E Pastorino Nursery v. Duke Energy Trading & Mktg., LLC*, 2005 U.S. App. LEXIS 3315 (9th Cir. Feb. 25, 2005) (same).

Petitioner timely filed a petition for writ of certiorari.

REASONS FOR DENYING THE PETITION

Petitioner, the California Attorney General, presents two questions for review.

The first is whether the case was "improperly removed . . . because *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), and *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), compel the conclusion that neither original nor removal jurisdiction may be found in Section 825p of the Federal Power Act, 16 U.S.C. § 825p. . . ." Pet. at i. This question is not worthy of review. The issue is neither controversial nor important, in part because its answer is obvious. Section 825p on its face is a grant of jurisdiction to the federal courts. It reads in pertinent part:

> The district courts of the United States . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability

> or duty created by, or to enjoin any violation of, this chapter or any rule, regulation or order thereunder.

The notion that "neither original nor removal jurisdiction" may be based on that language is specious. As detailed below, *Merrell Dow*, although a removal case, doesn't mention or consider Section 825p or any other special jurisdiction provision, and the decision below in no way conflicts with *Merrell Dow*. *Pan American* is not a removal case and it doesn't mention Section 825p either. Its conclusion that a similarly worded provision in the Natural Gas Act did not create *a jurisdictional defense in state court* to a state law contract claim is not pertinent to the removal of this case. Courts of appeals that have considered whether special jurisdiction provisions like Section 825p may serve as a jurisdictional basis for removal have consistently ruled that they may.

The second question is whether "the sovereign immunity of the States, as preserved by the Eleventh Amendment" bars removal of a civil action filed by the state as a plaintiff, if the action is otherwise within the removal jurisdiction of the federal courts. Petition at *i*. For almost 200 years that question has been answered in the negative by this Court and by every court of appeals that has considered it. The issue does not warrant review.

In addition to holding that the complaints below were properly removed to federal court, the Court of Appeals upheld dismissal of the claims on the merits based on preemption by the FPA and based on the filed rate doctrine. Petitioner does not seek review of or challenge the merits dismissals, which are consistent with a recent series of rulings by the Circuit in similar cases, some brought by Petitioner. In addition, FERC has considered the issues raised by these complaints in separate proceedings in which Petitioner has participated. No public

interest is served by Petitioner's attempt to use state law to circumvent FERC's resolution of the matter.

I. The Decision Below, Upholding Removal under a Federal Statute that Unambiguously Confers Jurisdiction in the District Courts, Is Consistent with the Decisions of this Court and the Other Circuits

A. The Terms of the Relevant Statutes Establish Jurisdiction In This Case.

The question Petitioner articulates for review explicitly raises the issue of whether FPA Section 825p, 16 U.S.C. § 825p, may serve as a basis for original federal jurisdiction. His opening argument to the contrary, however, is based on cases considering the removal of "artfully pled" complaints where original jurisdiction was based solely on the general federal question statute, 28 U.S.C. § 1331, rather than on a special jurisdiction provision. Pet. at 9-10 (relying primarily on *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983) ("*Franchise Tax Bd*")). Where original jurisdiction is based solely on 28 U.S.C. § 1331, the fact that an opinion on removal of such cases fails to mention special jurisdiction provisions does not imply that an "artfully pled" case that falls within such a special jurisdiction provision cannot be removed. Such cases simply do not address the question.

The plain language of the removal statute authorizes removal where a district court has original jurisdiction under a special jurisdiction provision like Section 825p. The removal statute provides for removal of:

> Any civil action of which the district courts have original jurisdiction *founded on a claim or right* arising under the Constitution, treaties or laws of the United States. . . .

28 U.S.C. § 1441(b) (emphasis added). Petitioner concedes that "[t]he ISO tariff has the force of federal law." *See* Pet. at 11 n.4.[3] FPA Section 825p, for its part, provides original jurisdiction:

> The district courts of the United States . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to *enforce any liability or duty created by*, or to enjoin any violation of, this chapter or any rule, regulation or order thereunder.

16 U.S.C. § 825p (emphasis added). Section 825p plainly grants the district courts certain jurisdiction. All "duties" imposed on Respondents with respect to the sale of Ancillary Services arise from the tariff, which defined the conditions under which energy could and could not be sold. Pet. App. at 6a-7a, 17a. Petitioner's complaint alleged a liability based on a violation of "the rules of the ISO market" which were codified in the tariff. Pet. App. at 133a. Since the underlying duties were the product of a federal tariff, Section 825p provides for original federal jurisdiction over the claim.

That original jurisdiction under Section 825p is also *exclusive*, rather than being concurrent with the courts of the states, cannot reasonably be read to narrow the jurisdictional grant as Petitioner asserts. The fact that the grant of federal jurisdiction makes that jurisdiction exclusive can only strengthen the basis for removal.

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[3] In any event, the "Laws of the United States" include federal regulations, *Fairview Township v. EPA*, 773 F.2d 517, 527 n.19 (3d Cir. 1985), which in turn include federal tariffs. *Marcus v. AT&T Corp.*, 138 F.3d 46, 55 (2nd Cir. 1998)

B. No Conflict Exists with *Merrell Dow*; Removal Here Is Properly Based on a Special Congressional Grant of Jurisdiction Found in the Federal Power Act.

Petitioner claims that the decision below conflicts with *Merrell Dow Pharmaceuticals, Inc. v. Thompson*. *See* 478 U.S. 804, 817 (1986) ("*Merrell Dow*"). This argument is flawed for two reasons. First, as the Court of Appeals explained, *Merrell Dow* considered only jurisdiction predicated solely on 28 U.S.C. § 1331. The *Merrell Dow* Court noted this limit at the outset of its analysis:

> Although the constitutional meaning of "arising under" may extend to all cases in which a federal question is "an ingredient" of the action, *Osborn v. Bank of the United States*, 9 Wheat. [22 U.S.] 738, 823, (1824), we have long construed the statutory grant of federal question jurisdiction as conferring a more limited power.

478 U.S. at 807; *see also id.* at 810 ("We have consistently emphasized that, *in exploring the outer reaches of § 1331*, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system") (emphasis added). Even the language from the end of the opinion, 478 U.S. at 817, quoted in the Petition at 15, quotes from and cites 28 U.S.C. § 1331, as Petitioner notes. Where federal jurisdiction is specially conferred under a statute other than 28 U.S.C. § 1331, *Merrell Dow* is not controlling.

As Petitioner notes at 7, the Court of Appeals first identified a special jurisdiction provision as providing a basis for removal, and distinguished *Merrell Dow* on that basis, in *Sparta Surgical Corp. v. National Association of Securities Dealers*, 159 F.3d 1209 (9th Cir. 1998) ("*Sparta*"). *Sparta* provides another example of a case in

which the plaintiff alleged only state law claims, but sought relief "based in part upon [the National Association of Securities Dealer's] purported violation of its own rules[.]" *Id.* at 1211. The rules at issue "were issued pursuant to the [Securities] Exchange Act's directive" regarding "self-regulatory organizations." *Id.* at 1212. Based on the exclusive jurisdiction provision of the Securities Exchange Act, essentially identical to that in the FPA, the court of appeals concluded that the plaintiff sought relief available exclusively in the federal courts. Thus, by seeking remedies only available in federal court, the *complaint* established original jurisdiction in the federal courts. *Id.* at 1212. The appeals court held the plaintiff in *Sparta* could not avoid federal jurisdiction merely by omitting the federal claims necessary to its complaint. *Id.*; *see also Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164 (1997).

The analysis below and in *Sparta* has been uniformly adopted by other courts of appeals. There is no split in the circuits on the issue. *See D'Alessio v. N.Y. Stock Exch., Inc.*, 258 F.3d 93 (2d Cir.), *cert. denied*, 524 U.S. 1066 (2001) (upholding removal and dismissal of state law claims omitting necessary Securities Exchange Act allegation); *Hawkins v. NASD Inc.*, 149 F.3d 330 (5th Cir. 1998) (upholding removal and dismissal of state law claims challenging liabilities and duties created by the Securities Exchange Act); *MM&S Fin., Inc. v. NASD, Inc.*, 364 F.3d 908 (8th Cir. 2004) (dismissing common law state claims as an attempt to plead around the Securities Exchange

Act). Petitioner's attempt to manufacture a split among the circuit courts fails.[4]

Second, the logic of *Merrell Dow* does not extend to this case. *Merrell Dow* considered six state tort causes of action alleging birth defects attributable to the use of the drug Bendectin. Five causes of action were based solely on state law. One negligence *per se* claim alleged an inadequate warning in violation of the Federal Food Drug and Cosmetic Act ("FDCA") as the basis for negligence "per se." 478 U.S. at 805-06. Defendants' removal was based on the one cause of action alleging a violation of the FDCA. *Id.* The Court's analysis assumed that the FDCA did not provide a federal cause of action, and based on that assumption concluded that "Congress did not intend a private federal remedy for violations of the statute that it enacted." *Id.* at 811. The Court reasoned it would therefore undermine "congressional intent to conclude that the federal courts might . . . exercise federal-question jurisdiction and provide remedies for violations of [the FDCA] solely because the violation of the [FDCA] is said

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[4] Thus, Petitioner's assertion that this decision conflicts with other Circuits "which have hewn to *Merrell Dow*" (Pet. at 16 n.8) is incorrect. Because the decision is not inconsistent with *Merrell Dow*, there is no conflict with other Circuits that also properly apply *Merrell Dow*. Nor does *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003) ("*Beneficial*"), affect the analysis. While *Beneficial* recognized "complete preemption" as one basis for federal jurisdiction under the removal statute, *see* 539 U.S. at 8, this Court did not even address, much less overrule, its numerous precedents upholding removal under other doctrines, such as where a state cause of action requires resolution of a substantial question of federal law. *See, e.g., Int'l Coll. of Surgeons*, 522 U.S. at 164; *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112-13 (1936); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199-202 (1921); *see also Franchise Tax Bd.*, 463 U.S. at 9. Nothing about the decision below, upholding removal of a claimed violation of federal law where the governing federal statute confers exclusive district court jurisdiction, is contrary to this long line of settled case law.

to be a 'rebuttable presumption' or a 'proximate cause' under state law, rather than a federal action under federal law." *Id.* at 812 (footnote omitted).

The Court reiterated this analysis in distinguishing its earlier decision in *Franchise Tax Board*:

> *Franchise Tax Board* thus candidly recognized the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction. Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system. . . . We simply conclude that *the congressional determination that there should be no federal remedy for the violation of this federal statute* is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.

Id. at 814 (emphasis added).

Merrell Dow's key conclusion that Congress intended no federal remedy does not fit a statute, such as the one here, that provides an administrative remedy at FERC for claims based on violations of the tariffs, subject to appellate review in Article III courts. *See* 16 U.S.C. §§ 824e(a), 825l(b). As discussed in section A., *supra*, Petitioner has pursued its remedies at FERC for the conduct alleged. Moreover, in contrast to the narrow role played by federal law in *Merrell Dow*, here federal law in the form of the relevant tariff actually created the Ancillary Services that were the subject of the claim.

Petitioner's impassioned argument at 17-18 in substance asks for a ruling from the Court that Congress may

not, for matters of such national importance that it has created a special administrative agency to oversee them, create special original jurisdiction in the federal courts and have that jurisdiction serve as a basis for removal of "artfully pled" claims to federal court. That is not a credible position worthy of review.

C. *Pan American's* Treatment of the Exclusive Jurisdiction Provision of the Natural Gas Act Is Inapposite Here.

Petitioner similarly – and incorrectly – claims the Court of Appeals' decision conflicts with *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961) ("*Pan American*"). *See* Pet. at 13. *Pan American* is inapposite. It is not a removal case. It does not even address federal jurisdiction. Rather, it considers state court jurisdiction to hear a contract claim that did not seek to change, supplement or challenge actions take by the Federal Power Commission [FERC's predecessor] under the Natural Gas Act ("NGA").[5] "The sole question, both below and here, is whether *the state courts* had jurisdiction." *Pan American*, 366 U.S. at 657 (emphasis added). Here the issue is whether the federal court had removal jurisdiction.

Pan American ruled that the exclusive federal jurisdiction provision in the NGA did not preclude state court jurisdiction over contract claims based on contracts the Court had recently held to be subject to FPC jurisdiction under that Act. *Id.* at 660, 662-63. That the Court did not

[5] It is undisputed that, as Petitioner states, the Natural Gas Act and the Federal Power Act share an identical exclusive jurisdiction provision and that they share historically related statutory schemes. *See* Pet. at 14 n.6.

interpret the exclusive jurisdiction provision of the NGA to eliminate state court jurisdiction over claims based on those contracts has no relevance to the removal issue here. Petitioner is not a party to any contract and is not suing to enforce contract rights.

The Ninth Circuit has explicitly recognized, in a related case, that state courts have jurisdiction over *contract* claims that do not impinge on FERC authority, even where the agreement is subject to the agency's jurisdiction. *Pub. Util. Dist. No. 1 of Grays Harbor County v. Idacorp Inc.*, 379 F.3d 641, 652 (9th Cir. 2004). The established notion that a simple contract claim under a tariffed agreement, like a collection action, is filed in state court rather than with FERC has no pertinence here and does not create a controversy suitable for certiorari review.

In *Pan American* the Court first concluded that the complaint's "operative paragraphs demand recovery on alleged contracts. . . . No right is asserted under the Natural Gas Act. The suits are thus based upon claims of right arising under state, not federal, law." *Id.* at 662-63. Having found that the suits were based on state law, the Court had no difficulty in taking the next step of concluding that the NGA's exclusive jurisdiction provision for claims under federal law did not bar bringing the state law contract claim in state court.

The passage that Petitioner quotes as conflicting with the decision below says: "'Exclusive jurisdiction' is given the federal courts but it is 'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded." *Id.* at 664. That language merely concludes that because the claim in *Pan American* was not based on the NGA, but rather on state contract law, the claim was not one over

which the federal courts were granted jurisdiction in NGA § 22. Since Section 22 did not grant federal jurisdiction over that claim, the "exclusiveness" provided for in the statute did not bar state court jurisdiction over it. "Exclusiveness" is a consequence of federal jurisdiction, no more.

Here, by contrast, the claims – claims by a non-party to the federal ISO tariff alleging tariff violations – do fall under the terms of the jurisdictional grant in the FPA and therefore federal jurisdiction over them is exclusive.[6] Unlike in *Pan American*, there is no contract at issue separate from the tariff. "The tariff defines the companies' contractual obligation with respect to the conduct at issue. Absent a violation of the FERC-filed tariff, no state law liability could survive." Pet. App. at 17a-18a. By grounding his state law claim in allegations that necessarily turn on the construction of federal law, Petitioner provided the original jurisdiction for the federal courts to hear his complaint. *See Int'l Coll. of Surgeons*, 522 U.S. 156, 164 (1997); *see also Clark v. Gulf Oil Corp.*, 570 F.2d 1138, 1143 (3d Cir. 1977) (distinguishing *Pan American* and finding federal jurisdiction where the plaintiffs' claims, as pled, "alleged injuries flowing from a violation of federal law").[7]

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[6] The *Pan American* analysis does assume that a claim could arise under the NGA and, if it did, that jurisdiction would be based on Section 22 of that Act, contrary to Petitioner's reading of the companion provision in the Federal Power Act.

[7] Petitioner attempts to bolster his *Pan American* argument by stating the "'*Sparta* exception' also conflicts with decisions of other Circuits that adhere to *Pan American*." Pet. at 15 n.7. No such conflict exists. To begin with, as explained above, *Sparta* does not conflict with *Pan American*, thus adherence to *Pan American* does not expose a split in the circuits. Second, the cases Petitioner cites to create this alleged split do nothing of the sort. The first such decision, *Powers v. S. Cent. United Food & Commercial Workers Unions & Employers Health & Welfare Trust*, 719 F.2d 760, 765 (5th Cir. 1983), is irrelevant because that court

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D. Petitioner's State Law Argument About the Scope of California's Unfair Competition Law Counsels Against Granting Certiorari.

Petitioner also argues that the Court of Appeals misinterpreted state law governing his claims under the UCL, and that a different interpretation of state law shows his claim is not predicated on federal law. Pet. at 11-12. That argument provides a separate ground for denial of certiorari. To the extent that the issue presented turns on a question of state law, it is not an issue appropriate for certiorari review. *See Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts").

II. The First Question Presented for Review Is Not Presented By This Case

Certiorari is also inappropriate because the first question on which Petitioner seeks review is not presented by this

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expressly held that the plaintiff's claim "raised no federal issue, and relied on no federal statute," and the federal issue of preemption under the ERISA laws arose solely as a *defense*. Moreover, the issue raised in *Powers* was resolved long ago by this Court, in a manner contrary to that urged by Petitioner, in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 76 (1987), which held that a claim seeking benefits under an ERISA plan "is necessarily federal in character" and thus removeable. *Metropolitan Life* expressly recognized *Powers*' contrary holding and implicitly overruled it. *Metropolitan Life*, 481 U.S. at 62 n.2. *Exxon Corp. v. Hunt*, 683 F.2d 69 (3d Cir. 1982), was not a removal case at all and simply held that no federal jurisdiction lay in a declaratory judgment action seeking a ruling that a state tax was preempted by the federal Superfund Act. That "a declaratory judgment complaint does not state a cause of action arising under federal law when the federal issue is in the nature of a defense to a state law claim," *id.* at 73, has no relevance to Petitioner's claim.

case. *See* S. CT. R. 15(2). The Petitioner's stated question seeks review of a decision in which the Ninth Circuit held that "removal jurisdiction may be found in Section 825p of the Federal Power Act, 16 U.S.C. § 825p, and as the United States Court of Appeals for the Ninth Circuit acknowledged, no other statute authorized the exercise of federal jurisdiction." Pet. at i. That formulation mischaracterizes the Court of Appeals opinion. In his brief, Petitioner asserts that in affirming removal, the Ninth Circuit noted that "*Merrell Dow* precludes federal jurisdiction under 28 U.S.C. § 1331," (Pet. at 6-7), and "stated that these cases would not be removeable under *Merrell Dow*, but held that they were nevertheless removeable under *Sparta*." Pet. at 13 (citing Pet. App. at 18a-19a). A plain reading of the Court of Appeal's decision shows that Petitioner misstates the decision in this regard.

The Court of Appeals did not address whether *Merrell Dow* would bar removal if original jurisdiction were based solely on Section 1331. It did not reach that issue, having found jurisdiction under the express grant of federal jurisdiction in Section 825p. Following *Sparta*, the Ninth Circuit held here that "removal jurisdiction lies over a claim to enforce obligations that squarely fall within the exclusive jurisdiction provision of the Federal Power Act. *See* 16 U.S.C. § 825p." Pet. App. at 22a. Petitioner erroneously attributes as a holding in this case the Ninth Circuit's observation that "*for Sparta's claim*, there would have been no jurisdiction predicated solely on 28 U.S.C. § 1331." Pet. App. at 19a (emphasis added). This case is not *Sparta*. The Court of Appeals expressly declined to reach a decision on the issue in the instant case because it had determined the case was removeable under Section 825p. Pet. App. at 22a & n.11.

As discussed above in section I.B., *Merrell Dow* would not bar removal of this case even if this Court determined that the Ninth Circuit's analysis under *Sparta* were

incorrect. As the Court of Appeals expressly recognized, "[t]he very face of [Petitioner]'s complaint betrays that the gravamen of the complaint is the companies' alleged violations of federal tariff obligations." Pet. App. at 17a n.6. Petitioner's "state claim represented a naked attempt to enforce these federal obligations." Pet. App. at 22a. Thus, a federal question is apparent on the face of the complaint, and Petitioner does not challenge the dismissal on the merits. "'[E]ven though state law creates [a party's] causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law.'" *Int'l Coll. of Surgeons*, 522 U.S. at 164 (*quoting Franchise Tax Bd.*, 463 U.S. at 13). This Court "reviews judgments, not statements in opinions," *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956), and does not ordinarily "decide questions that cannot affect the rights of litigants in the case before" it. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Petitioner presents a question that is not raised in this case, and resolution of the issues on which Petitioner seeks review will not affect the outcome.

III. Sovereign Immunity Does Not Bar Removal Where There Is No Claim Against the State

Petitioner also seeks review of whether state sovereign immunity "as preserved by the Eleventh Amendment" barred removal of the case. Pet. at i; 21-27. That is not a question worthy of review. The issue is settled by a consistent line of authority from this Court and the courts of appeals.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted *against one of the United*

> *States* by Citizens of another State, or by Citizens or Subjects of any Foreign State. (emphasis added)

This is not a case "commenced or prosecuted against" a state. It is a case brought initially by a state in which no claim of any kind was asserted against the state. Sovereign immunity does not apply to the simple removal of such a case to federal court.

The Court of Appeals of course recognized in its opinion below that under this Court's rulings a state's sovereign immunity is broader than the strict language of the Eleventh Amendment, which preserves the "States' immunity from suit" as it existed at the time the Constitution was adopted. Pet. App. at 23a-24a, citing *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 669 (1999) (sovereign immunity transcends the narrow text of the Amendment itself); *Alden v. Maine*, 527 U.S. 706 (1999) (immunity for suits in state court); *Hans v. Louisiana*, 134 U.S. 1 (1890) (immunity for suits by citizen of state itself). All of these cases, however, and the preserved immunity they recognize, involved lawsuits *against* a state seeking monetary or injunctive relief. Where the suit, as here, is *by* the state, this Court and the courts of appeals have adhered to the language of the Eleventh Amendment and held for nearly 200 years that no immunity is available. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Regents of Univ. of Cal. v. Eli Lilly & Co.*, 119 F. 3d. 1559, 1564 (Fed. Cir. 1997). As the Court of Appeals demonstrated, in a scholarly analysis which Petitioner simply ignores, (*see* Pet. App. at 23a-34a), there is unusually compelling authority that suits by a state were not within the scope of sovereign immunity at the time the Eleventh Amendment was adopted.

Petitioner nonetheless contends that the involuntary removal of its lawsuit to federal court violates the Eleventh Amendment by forcing it to litigate in federal court. Pet. at

21. This contention has been consistently rejected. It ignores the fact that the key purpose of sovereign immunity is to bar private suits against the state that would subject it to judgments that could drain the public treasury, restrain the government from acting or compel it to act. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984) (*quoting Dugan v. Rank*, 372 U.S. 609, 620 (1963)). That obviously is not the case here where Respondents seek no relief – monetary, injunctive or otherwise – against the state. Removal of such a case to federal court neither raises sovereign immunity concerns nor converts the case to one "commenced or prosecuted against" a state within the meaning of the Eleventh Amendment.

A. There Is No Question of First Impression, and this Court Has Consistently Held that Removal Does Not Constitute the Commencement or Prosecution of a Lawsuit Against the State.

In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the state of Virginia raised the Eleventh Amendment as a bar to review by the Supreme Court of a state court prosecution of individuals who had been convicted of selling lottery tickets in violation of Virginia law. The defendants sought review on the ground that the Supremacy Clause barred prosecution because the lottery had been authorized by Congress.[8]

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[8] Procedurally, *Cohens v. Virginia* involved a writ of error seeking review by the Supreme Court of a judgment of a Virginia state court, rather than removal of an action to federal district court. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) at 375-76. Nevertheless *Cohens* sets forth this Court's understanding of whether, at the time the Eleventh Amendment

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Chief Justice Marshall noted that, at the time the Constitution was adopted, all the states were greatly indebted and there was great apprehension that these debts might be prosecuted in the federal courts. *Id.* at 406; *see also Alden v. Maine*, 527 U.S. 706, 749-50 (1999). It was widely believed that principles of sovereign immunity would bar such suits.[9] Shortly after the Constitution was adopted, however, the Supreme Court held that a state could be sued by individual citizens of another state to collect such debts. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).[10] This resulted in the prompt passage of the Eleventh Amendment.

The primary purpose of the Eleventh Amendment was to bar such private suits by creditors of the state, and, according to Justice Marshall in *Cohens v. Virginia*, it therefore "extended to suits commenced or prosecuted by individuals, but *not* those brought *by* states." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) at 407 (emphasis added). Justice Marshall then went on to discuss whether a case filed by the state and subsequently brought into federal court by the defendant was one "commenced or prosecuted" against the state. Pointing out that "[t]o commence a suit, is to demand

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was adopted, sovereign immunity attached to actions prosecuted by a state.

[9] *See, e.g.*, Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton). Hamilton states in Federalist 81 that suits by individuals against states to collect the debts they owe were not possible due to sovereign immunity which "is the general sense and the general practice of mankind."

[10] The facts of *Chisholm* explain why the Eleventh Amendment was drafted to apply only to suits by citizens of "other states." Later decisions, including *Hans v. Louisiana*, 134 U.S. 1 (1890), and *Alden v. Maine*, 572 U.S. 706 (1999), applied the same reasoning to individual lawsuits to collect debts filed by a state's own citizens and in its own courts. This reasoning has no application here, where respondents are not seeking to collect a debt owed by the state.

something by the institution of process in a Court," Justice Marshall answered this question in the negative:

> "It is then, the opinion of the Court, that the defendant who removes a judgment rendered against him by a state court into this Court . . . *does not commence or prosecute a suit against the state.*"

Id. at 412 (emphasis added).

Two later Supreme Court decisions confirm that removal does not constitute commencement or prosecution of a lawsuit against the state within the meaning of the Eleventh Amendment. *Illinois v. City of Milwaukee*, 406 U.S. 91, 101 (1972) ("where a State is suing parties who are not other States . . . those suits 'may now be brought in or removed to the Circuit Courts [now the District Courts] [*sic*] without regard to the character of the parties'") (footnote omitted) (citing *Ames v. State of Kansas*, 111 U.S. 449 (1884)). *Ames* involved 28 U.S.C. § 1441 passed in 1875 to permit removal to lower federal courts based on federal question jurisdiction. The defendants removed an action filed by the state in its own courts based on this federal question jurisdiction.[11] The issue was whether the removal statute applied to states given their sovereign immunity. 111 U.S. at 470. This court noted that the state in *Cohens v. Virginia*, *supra*, had claimed the "same exemption" and Justice Marshall found that it would have great force where the case involves a demand by a citizen against his state, but not so for "a prosecution instituted against him by a State." *Id.* It then held the case was removable.

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[11] *Ames*, like this case, was an action by the state Attorney General against private parties. The Attorney General alleged that a consolidation among railroads was wrongful and unlawful.

Petitioner relies heavily on *Hans v. Louisiana*, 134 U.S. 1 (1890), as modifying or reversing the *Cohens-Ames* line of cases, and creating a presumption of immunity. This presumption, however, applies only to suits *against* the state.[12] *Hans* involved a claim *against* the state by one of its own citizens to recover money damages. Since the Eleventh Amendment only covers suits by citizens of another state, the issue was whether it also applies to suits by citizens of the same state. Reiterating the point that sovereign immunity is based on the need of states to have the "privilege of paying their own debts in their own way," 134 U.S. at 13, the *Hans* Court concluded that the rationale for sovereign immunity applied equally to suits by a state's own citizens as to suits by citizens of other states. At no time did the *Hans* court suggest that immunity should apply when there was no claim against the state, or to lawsuits that the state itself commences.[13]

B. The Circuits Are Not Divided.

Petitioner asserts that there is a split in the circuits due to the Eighth Circuit decision in *Thomas v. FAG Bearings Corp.*, 50 F.3d 502 (1995). *Thomas*, however, was

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[12] The presumption referenced in *Hans* is that, at the time the Constitution was adopted, sovereign immunity for claims against the state was well-settled, and there was thus a presumption that "no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution[.]" 134 U.S. at 18. The "anomalous proceedings" were suits against the state to collect debts. Respondents have no quarrel with this point, but it has no application here where respondents assert no claims against the state.

[13] In fact, the *Hans* court distinguished *Cohens v. Virginia*, *supra*, citing *Cohen's* language that there is no immunity where "[n]othing is demanded from the state. No claim against it of any description is asserted or prosecuted." 134 U.S. at 19.

not an action filed by the state as plaintiff and did not involve removal at all. There is no split among the Circuits on the issue Petitioner has presented.

Thomas was an environmental lawsuit by a citizens group in which the defendant moved to join a state agency as a party under Federal Rule of Civil Procedure 19(a). The Eighth Circuit held that such coercive joinder would undermine two aims of the Eleventh Amendment: protection of a state's autonomy and protection for its pocketbook. *Thomas*, 50 F.3d at 506. It would undermine autonomy by permitting a defendant to unilaterally waive the state's immunity, and undermine the state treasury since premature litigation would potentially limit the costs the state agency could recover in later litigation. *Id.*

Unlike a coercive joinder, however, the removal of a lawsuit filed by the state is neither a unilateral waiver of the state's immunity by a defendant nor does it pose a threat to the state treasury. Mere removal does not trigger any litigation against the state or force it to litigate any claims it has not already decided to litigate. Removal does not, as does coercive joinder, either "restrain the Government from acting or compel it to act." Pet. at 22. There is no conflict between the Ninth Circuit decision here and *Thomas*.

Other circuits and district courts have likewise concluded that removal of a lawsuit by the state does not implicate the policies underlying the Eleventh Amendment.[14]

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[14] There are two district court cases holding that the Eleventh Amendment precludes removal – *People v. Steelcase*, 792 F.Supp. 84, 86 (C.D.Cal. 1992); *Moore ex rel. Mississippi v. Abbott Labs., Inc.*, 900 F. Supp. 26, 30-31 (S.D.Miss. 1995) – but *Steelcase* cited no authority for so holding and then *Moore* simply relied on *Steelcase*. Both decisions have been criticized as lacking analysis or authority. *Regents of the Univ. of Minn. v. Glaxo Wellcome, Inc.*, 58 F. Supp. 2d 1036, 1040 (D. Minn. 1999). Moreover, *Steelcase* was effectively overruled by the decision below. Pet. at 33a, n.15.

Oklahoma ex rel. Edmondson v. Magnolia Marine Transp. Co., 359 F.3d 1237, 1239 (10th Cir. 2004) (finding that removal of an action filed by the state was not barred by the Eleventh Amendment and concluding that nearly every court to consider the issue in the removal context has concluded that "a State cannot assert Eleventh Amendment immunity to bar removal of a suit it has brought");[15] *Vermont v. Oncor Comms., Inc.*, 166 F.R.D. 313, 321 (D. Vt. 1996) ("The Eleventh Amendment does not bar removal of an action involving a federal question in which a state is a plaintiff); *Regents of the Univ. of Minn. v. Glaxo Wellcome, Inc.*, 58 F. Supp. 2d 1036, 1039-40 (D. Minn. 1999) (holding removal not barred when state is plaintiff relying on *Illinois v. City of Milwaukee*, *supra*, and numerous other cases); *In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 297 (S.D.N.Y. 2001) ("[W]hile the Eleventh Amendment in some areas has been extended beyond its textual limits, this is not the case with respect to state plaintiffs"); *S.D. State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.*, 778 F. Supp. 1515, 1522 (D.S.D. 1991). It was this body of case law that led the District Court here to find the petitioner's appeal of the immunity issue to be frivolous.[16] Pet. App. at 102a-103a. There is no split in the Circuits, or among the courts, on this issue.

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[15] *Oklahoma* did note that, when counterclaims are asserted against the state, the Eleventh Amendment may apply. 359 F.3d at 1240. Respondents here, however, have neither filed counterclaims nor sought any relief at all from the state.

[16] Other cases outside the removal context also hold there is no sovereign immunity when the state is a plaintiff. *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1564 (Fed. Cir. 1997) ("the Eleventh Amendment applies to suits 'against' a state, not suits by a state"), *cert. denied*, 523 U.S. 1089 (1998); *Huber, Hunt & Nichols, Inc. v. Architectural Stone Co.*, 625 F.2d 22, 24 n.6 (5th Cir. 1980) ("Of course, the eleventh amendment is inapplicable where a state is a plaintiff . . .").

C. The Court of Appeals Decision Does Not Expand Removal Jurisdiction or Threaten State Sovereignty.

Petitioner also argues that the Court of Appeals decision expands federal jurisdiction in a manner that creates uncertainty and is inconsistent with principles of federalism. Pet. at 25-27. Petitioner is mistaken. Federalism does not require immunity where no claim is asserted against the state. *Illinois v. City of Milwaukee*, 406 U.S. at 91, 101 (1972); *Cohens v. Virginia*, *supra*.

Petitioner cites *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J. and Stewart, J. concurring), and *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53-54 (1944) ("*Great Northern*"), for the proposition that the state should be able to choose its forum. Neither case, however, was an action by a state at all, let alone suggests that a state must always be able to choose its own forum. *Employees of the Department of Public Health* was an action by state employees against the state for overtime compensation. 411 U.S. at 280-81. This Court held that amendments to the Fair Labor Standards Act extending coverage to certain state employees did not waive the immunity of states from suit in federal court. *Id.* at 286-87. *Great Northern* was an action against the Oklahoma Insurance Commissioner to recover taxes paid under protest under an Oklahoma statute. 322 U.S. at 48. The court concluded that the state law could not operate as a waiver of immunity in federal courts. *Id.* at 54. Both cases involved claims against the state, and simply held that Eleventh Amendment immunity was not waived by the legislative enactments at issue. Neither has any relevance here.

Petitioner belatedly complains that its state law claims were "unexpectedly" alchemized into a federal case. This was, however, a self-inflicted wound. Petitioner alleged in the first paragraph of its Complaint that this was a scheme to violate a federal tariff. Pet. App. at 133a. The basis for virtually every charging allegation was a violation of various parts of that federal tariff. *Id.* at 148a-157a.

In short, there is no novel question here, and no uncertainty. When the state itself commences a lawsuit, and no claim or relief is sought against the state, the removal of such a lawsuit to federal court does not implicate the principles of sovereign immunity. This simple rule has been followed by this Court and other courts for nearly 200 years, and was applied by the Ninth Circuit here. There is no issue of first impression and no split in the circuits.

CONCLUSION

The Ninth Circuit Court of Appeals faithfully applied this Court's established precedent in upholding original jurisdiction over Petitioner's claim. In so doing, the Court of Appeals joined in the reasoning of the other federal circuit courts that have addressed this issue. Lacking any novel area of the law and with no split among the federal circuit courts, there are no compelling reasons for this Court to grant a petition for a writ of certiorari in this matter. Lacking such compelling reasons, this Court should deny the petition.

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